**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.614 OF 1992.**

1. Dharma Amruta Badade

2. Mahadu Dharma Badade

3. Balu Kashiram Badade .. Appellants.
(Original Defendants)

vs.

Gangaram Rama Badade, since
deceased through his heirs

1. Bhagubai Gangaram Badade

2. Gitabai Gangaram Badade ..Respondents
(Original Plaintiffs)

Shri R.A.Thorat, Advocate for the Appellants.

Shri C.G.Gavnekar, Advocate for the Respondent No.1.

**CORAM : S.R.SATHE, J.**

**DATED : 31ST AUGUST, 2004.**

**ORAL JUDGMENT :**

1. Being aggrieved by the judgment and order passed by the Court of 7th Additional District

Judge, Nasik in Civil Appeal No. 355 of 1989 whereby order passed by the Court of Civil Judge, Junior Division, Nasik in Civil Suit No. 14 of 1994 decreeing the plaintiffs suit for possession of the encroached portion of land was confirmed and the appeal was dismissed, the original defendants have preferred this Second Appeal. (For the sake of convenience hereafter the parties are referred to as plaintiffs and defendants.)

2. Brief facts giving rise to this appeal are as under :

. The suit land bearing block no. 504/2 admeasuring 3 Hectares 69 Ares described in detail in para 1 of the plaint is the property owned and possessed by the plaintiff. Adjacent to the said land there is defendants land bearing block no.485. According to the plaintiffs the defendant no.1 made an encroachment in the plaintiffs land to the extent of 55 Are while the defendant no.3 made an encroachment to the extent of 52 Ares. The plaintiff, therefore, filed an application no.80/80 under Section 138 of the Maharashtra Land

Revenue Code regarding the removal of the encroachment. The said application was decided by the Assistant Collector on 20.12.1980 wherein he directed that both the parties shall make application jointly for measurement of the land. The plaintiffs therefore again submitted an application bearing No. 115 of 1982. The said application was decided on 26.7.1982 whereby the defendants were called upon to remove the encroachment. Inspite of the same the defendants did not remove the encroachment. Hence on 19.1.1984 the plaintiffs filed the present suit for possession of the encroached portion.

3. The defendants filed their written statement at exhibit 12 and resisted the suit claim. They contended that the description of the suit property given by the plaintiff is not correct and the plaintiffs are infact not the owners of the suit property. They also denied the allegation that the defendants encroached the suit property as alleged in the plaint. The defendants further contended that the allegation of the plaintiff that defendants made an encroachment in the suit

land about 5 to 6 years back is not correct. On the contrary, the suit land bearing Nos.578, 580 and 581 were initially owned by Raghunath Waman and Vasudev Waman Patankar and the father of the defendant no.1, namely Amruta Narayan Badade was the tenant in the said land. He infact paid the consideration of the suit land and purchased the said land. The plaintiff, however, taking advantage of the fact that he was Kotwal got his name entered in the record of rights and on that basis started making applications to various revenue authorities. The defendants admitted that plaintiffs had filed application No. 115 of 1982 on 26.7.1982. The SDO directed to hand over the possession of the encroached land. They however contended that the said order is challenged by them and it has been stayed till today. The defendants also contended that the plaintiffs are not entitled to get compensation as prayed and the suit is barred by law of limitations. Hence on all these grounds the defendants prayed for dismissal of the suit.

4. On these pleadings the trial court framed

issues at exhibit 20 and after considering the evidence adduced by both the parties the trial court came to the conclusion that plaintiff has proved that the defendant has made an encroachment as alleged and the suit is not barred by law of limitations. Naturally he decreed the plaintiffs suit. The said order was challenged by defendants in first appeal and the said appeal also came to be dismissed. Hence they filed the present second appeal.

5. From the perusal of the record it appears that at the time of admission of this appeal, this Court passed the following order on 12.11.1992.

" Admit Ground B to E, substantial question of law"

The said grounds are as under :

> " (B) Whether the suit filed for the removal of the encroachment, without filing any map or sketch showing the location of the encroachment violates

mandatory requirement of Order 7 of Civil Procedure Code, 1908 and is liable to be rejected on that ground?

(C) Whether the description of the suit property as given in the plaint was sufficient in order to enable the Defendants to contest the suit on merits particularly when it is alleged that the Defendant No.1 encroached 55Are portion while Defendant No.3 encroached 52 Are portion?

(D) Whether the suit ought to fail by reason of misjoinder of causes of action since Defendants Nos.1 and 3 have allegedly encroached different portions of the suit land?

(E) Whether the suit is barred by limitation particularly in view of the admission of the plaintiffs witness that the Defendants are in possession of the encroached portion for 20 years i.e. for

more than 12 years on the date of the suit?"

6. In this appeal before me, Shri R.A.Thorat, learned Advocate for the defendants firstly argued before me that the First Appellate Court has merely confirmed the finding recorded by the trial court without properly formulating the point for consideration. He, therefore, submitted that the order passed by the first appellate court is not in accordance with the provisions of Order 41 Rule 31 of Civil Procedure Code, 1908 and as such same is not legal. In order to substantiate his proposition he has drawn my attention to following cases Smt.Anita M. Barreto v. Abdul Wahid Sanaullah, 1985(1) Bom.C.R.130, State of Rajasthan v. Harphool Singh (2000) 5 Supreme Court Cases 652, and Madhukar & Others v. Sangram & Others (2001) 4 Supreme Court Cases 756. In all these authorities it has been held that it is the duty of the first appellate court to critically analyse the points involved in the matter and the order passed. It cannot mechanically affirm findings of trial court without due and proper application of

mind. The proposition laid down in these authorities is not disputed and can not be disputed. The question is whether in the instant case judgment of the first appellate court suffers from this lacuna. For this purpose we want to seethe judgment of the first appellate court. From the perusal of the same it does appear that the first appellate court has not specifically formulated all the points which were necessary for consideration and the first appellate court had only mentioned that the point for determination is whether the plaintiff is entitled to get the recovery of the encroached portion to the extent of 55 Are and 52 Are. However, if we peruse the entire judgment it appears that though specific point with regard to limitation and adverse possession were not formulated by the first appellate court, the first appellate court has infact considered both these points and has specifically given finding that the defendant has failed to establish the adverse possession and suit is in time. So, merely because the first appellate court has not specifically formulated those questions for consideration, it can not be

said that the judgment of the first appellate court suffers on that ground. Hence I am not inclined to accept the argument of the learned advocate for the appellant in this behalf.

7. From the perusal of the record it is very clear that so far as the land bearing block no.504/2 is concerned, the same is owned and possessed by the plaintiffs. It is not in dispute that the said land was initially consisting of the lands bearing survey nos.578, 580 and 581. The defendants though contended that the suit land is owned by them they have not produced even single 7/12 extract or any extract of relevant mutation entry to show that the land in question is owned by them. As against this, the plaintiffs have produced at exhibit 28 & 29 the 7/12 extracts of the said land right from the year 1975-76, wherein we find the name of Gangaram Rama Badade in the holders column. It is true that in exhibit 42 the name of Dharma Amruta Badade i.e. Defendant no.1 has been shown in the column of Cultivation , but it has to be mentioned that the said entry is only a pencil entry and the same has not been

certified. So in absence of any material on record to show that the land bearing block no.504/2 is owned by the defendants, relying on the 7/12 extract produced by the plaintiffs, both the courts below have rightly recorded the finding that the plaintiffs have proved that the land in question is owned by them.

8. It is the case of the plaintiff that the defendant no.1 has made an encroachment in the suit land to the extend of 55 Are while the defendant No.3 has made an encroachment of 52 Are. The learned Advocate for the Defendants/ appellants canvassed before me that the plaintiff has not produced any map alongwith the plaint showing the alleged encroachment. Infact, as per the provisions of Order 7 Rule 3 of C.P.c.it was incumbent upon the plaintiff to produce the said map and in absence of such map it must be held that the suit is not maintainable. It is true that the plaintiff has not actually produced the map alongwith the plaint, but thereafter he has produced the map drawn by the Cadestral Surveyor. Besides this we find that the boundaries of the

land in question are specifically mentioned in the plaint para 1, The same are sufficient to identify the disputed portion and thus object of Order 7 Rule 3 of C.P.C. is served. So, under such circumstances, merely because the map of the encroached portion is not produced alongwith the plaint, I am not inclined to hold that the suit is not maintainable.

9. It is an admitted fact that the plaintiffs had made an application under section 138 of the Maharashtra land Revenue code and as per the directions given in the earlier application No.80 of 1980 the plaintiffs had preferred the second application for measurement of the land in question. There was infact direction for both the parties to make a joint application for measurement. Admittedly, the defendants did not file any such application and co-operate. The plaintiff, therefore, filed the second application and after hearing both the parties the Special Divisional Officer, Nasik came to the conclusion on the basis of the map drawn by the Cadestral Surveyor that the defendant no.1 has made an

encroachment in the plaintiffs land to the extent of 55 Are, while the defendant no.3 has made an encroachment to the extent of 52 Are. He, therefore, passed the order to remove the said encroachment. The plaintiff has examined himself and produced the said map as well as the judgment given by the Special Divisional Officer in the encroachment application No. 80 of 1980 as well as 114 of 1982. Thus, from the said evidence both the courts below held that the plaintiffs have proved the alleged encroachment. An attempt has been made by the learned advocate for defendants to show that the said map can not be relied upon because the Cadestral Surveyor was not examined. However, non-examination of the cadastral surveyor by itself is not sufficient to discard the above mentioned order, particularly when the plaintiffs had otherwise proved the map.

10. The learned Advocate for the defendants argued before me that in the instant case the land in question is in possession of the defendants for several years and as such they have infact become the owners by adverse possession. It is needless

to say that adverse possession means the possession which is hostile under the claim or colour of title and it must be actual, open, uninterrupted, notorious and exclusive. If all these essential ingredients are fulfilled by the defendants then only it can be said that the defendants have established their claim of adverse possession. If we peruse the evidence of defendants in this behalf, it must be noted that the defendants are not even in a position to state as to when the adverse possession started. At one stage they have stated that they are in possession of the suit property for last about 50 to 60 years , while at the other stage they have stated that they are in possession since the time of their father. But no specific evidence in that behalf is adduced by the defendants. There was also no evidence to show that the essential ingredient of adverse possession namely animus to hold adversely was present in this case. So, having regard to this aspect the trial court held that the defendant has failed to establish the adverse possession. Shri Thorat, however, argued before me that even if it is held that defendants have

failed to establish adverse possession that does not mean that the suit is in time or the provisions of Article 65 of the Limitation Act are not attracted. While canvassing this point he submitted that the plaintiff has infact stated in his examination in chief that the defendant is in possession of the property in question for last about 20 years. So relying on this he said that it is to be held that the suit is barred by law of limitation. As per Article 65, the period of limitation is 12 years when the possession of the defendant becomes adverse to the plaintiff. So, the element of possession being adverse is absolutely essential for the application ofthis article. In the instant case, the trial court after considering the evidence on record has specifically observed that the plaintiff has failed to establish that he has become owner by adverse possession. The necessary ingredients required for adverse possession were lacking, so merely because the plaintiff has made one stray statement that defendant was in possession for 20 years does not necessarily mean that it was adverse to the plaintiff and the time for filing

suit starts running from the said period. On the contrary, it appears that the plaintiff has categorically stated that 5 to 6 years prior to the filing of the suit, the defendants started giving trouble to the defendant and they made an encroachment in plaintiffs land. The plaintiff, therefore, got the land measured by making an application under section 138 of the Maharashtra Land Revenue Court and after ascertaining the exact encroachment he filed the present suit. So, under such circumstances both the courts below have rightly held that the suit is not barred under Article 65 of the Limitation Act.

10. In this view of the matter, I think that there is no substance in the appeal filed by the defendants. The appeal is dismissed with cost.

11. However, the defendants are directed to hand over the possession by 30.10.2004.

12. C.C.expedited.

( S.R.Sathe, J.)